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THE NEW CONSTITUTIONALISM AND THE JUDICIALIZATION OF PURE POLITICS WORLDWIDE

*Ran Hirschl**

INTRODUCTION

Over the last few decades the world has witnessed a profound transfer of power from representative institutions to judiciaries, whether domestic or supranational. The concept of constitutional supremacy—one that has long been a major pillar of the American political order—is now shared, in one form or another, by over one hundred countries across the globe. Numerous post-authoritarian regimes in the former Eastern Bloc, Southern Europe, Latin America, and Asia have been quick to endorse principles of modern constitutionalism upon their transition to democracy. Even countries such as Canada, Israel, Britain, and New Zealand—not long ago described as the last bastions of Westminster-style parliamentary sovereignty—have gradually embarked on the global trend towards constitutionalization. Almost every day newspaper headlines report on issues such as constitutionalization processes in the European Union (EU) and Iraq, trials of ousted despots before international tribunals, and landmark constitutional jurisprudence in the United States, Germany, or South Africa.

One of the main manifestations of this trend has been the judicialization of politics—the ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies. Armed with newly acquired judicial review procedures, national high courts worldwide have been frequently asked to resolve a range of issues, from the scope of expression and religious liberties, equality rights, privacy, and reproductive freedoms, to public policies pertaining to criminal justice, property, trade and commerce, education, immigration, labor, and environmental protection. Bold newspaper headlines reporting on landmark court rulings concerning hotly contested issues—same sex marriage, limits on campaign financing, and affirmative action, to give a few examples—have become a common phenomenon.

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This is evident in the United States, where the legacy of active judicial review recently marked its bicentennial anniversary; here, courts have long played a significant role in policy making. It is just as evident in younger constitutional democracies that have established active judicial review mechanisms only in the last few decades. Meanwhile, transnational tribunals have become the main loci for coordinating policies at the global or regional level, from trade and monetary issues to labor standards and environmental regulations.

However, the growing political significance of courts has become not only more widespread, but also expanded in scope to become a manifold, multifaceted phenomenon that extends well beyond the now "standard" concept of judge-made policy making, through ordinary rights jurisprudence and judicial redrawing of legislative boundaries between state organs. The judicialization of politics now includes the wholesale transfer to the courts of some of the most pertinent and polemical political controversies a democratic polity can contemplate. Recall such matters as the outcome of the American presidential election of 2000, the new constitutional order in South Africa, Germany's place in the EU, the war in Chechnya, Argentina's economic policy, Hungary's welfare regime, the Pervez Musharraf-led military coup d'état in Pakistan, transitional justice dilemmas in post-authoritarian Latin America and post-communist Europe, the secular nature of Turkey's political system, Israel's foundational definition as a "Jewish and Democratic State," or the political future of Quebec and the Canadian federation: All of these and many other hotly contested political issues have been framed as constitutional issues. And this has been accompanied by the concomitant assumption that courts—not politicians or the demos itself—are the appropriate forums for making these key decisions. In short, to paraphrase Alexis de Tocqueville's observation with respect to the United States,[1] there is now hardly any public policy dilemma or political disagreement in the world of new constitutionalism that does not sooner or later become a judicial one.

Despite the increasing prevalence of this phenomenon, academic discourse addressing the judicialization of politics worldwide remains surprisingly sketchy. With a few notable exceptions,[2] the judicialization of

1. Alexis de Tocqueville, 1 *Democracy in America* 102-09 (Phillips Bradley ed. & trans., Vintage Books 10th ed. 1961) (1835).

2. *See, e.g.*, The Global Expansion of Judicial Power (C. Neal Tate & Torbjörn Vallinder eds., 1995); Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2004) [hereinafter Hirschl, Towards Juristocracy]; The Judicialization of Politics in Latin America (Rachel Sieder et al. eds., 2005); Martin Shapiro & Alec Stone Sweet, On Law, Politics, and Judicialization (2002); John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 Law & Contemp. Probs. 41 (2002); Ran Hirschl, *Resituating the Judicialization of Politics:* Bush v. Gore *as a Global Trend*, 15 Can. J.L. & Juris. 191 (2002) [hereinafter Hirschl, Bush v. Gore]; Richard H. Pildes, *The Supreme Court, 2003 Term: Foreword: The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 29 (2004).

politics is often treated in a rather unrefined fashion as an organic byproduct of the prevalence of rights discourse. It is sometimes confused with a generic version of judicial activism, with little or no attention to the distinction between reliance on courts for determining say, the scope of the right to fair trial, and reliance on courts for dealing with watershed questions of nation building and collective identity that lie at the heart of a nation's self-definition. In this paper, I chart the contours of the latter aspect, or what may be called the judicialization of *mega* or *pure* politics. I begin by distinguishing among three broad categories of judicialization: (1) the spread of legal discourse, jargon, rules, and procedures into the political sphere and policy making forums and processes; (2) judicialization of public policy-making through "ordinary" administrative and judicial review; and (3) the judicialization of "pure politics"—the transfer to the courts of matters of an outright political nature and significance including core regime legitimacy and collective identity questions that define (and often divide) whole polities. I then illustrate the distinct characteristics of this latter type of judicialization through recent political jurisprudence of courts and tribunals worldwide. In the paper's final part, I illustrate the significance of the political sphere's support as a necessary precondition for the judicialization of pure politics. These examples suggest that constitutional law is indeed a form of politics by other means.

I. THE THREE FACES OF JUDICIALIZED POLITICS

The "judicialization of politics" is an often umbrella-like term referring to what are really three interrelated processes. At the most abstract level, the judicialization of politics refers to the spread of legal discourse, jargon, rules, and procedures into the political sphere and policy-making forums and processes. The ascendancy of legal discourse and the popularization of legal jargon are evident in virtually every aspect of modern life. It is perhaps best illustrated by the subordination of almost every decision-making forum in modern rule-of-law polities to quasi-judicial norms and procedures. Matters that had previously been negotiated in an informal or nonjudicial fashion have now come to be dominated by legal rules and procedures.[3]

Judicialization of this type is inextricable from law's capture of social relationships and popular culture and its expropriation of social conflicts. It stems from the increasing complexity and contingency of modern societies,[4] or from the creation and expansion of the modern welfare state

3. Rachel Sieder, *Introduction* to The Judicialization of Politics in Latin America, *supra* note 2, at 5.

4. *See* Niklas Luhmann, A Sociological Theory of Law (Elizabeth King & Martin Albrow trans., Routledge & Kegan Paul 1985) (1972).

with its numerous regulatory agencies.[5] Some accounts of the rapid growth of judicialization at the supranational judicial level portray it as an inevitable institutional response to complex coordination problems deriving from the systemic need to adopt standardized legal norms and administrative regulations across member-states in an era of converging economic markets.[6]

Related aspects of this type of "juridification" of modern life have also been identified by early legal sociologists—for example, Henry Maine's "from status to contract" thesis[7] or Max Weber's emphasis on the rise of a formal, unambiguous, and rational legal system in Western societies.[8] Lawyers are the main "moles" of such "organic judicialization." According to Emile Durkheim, for example, law reflects the evolving division of labor and interpersonal solidarity within a society.[9] In primitive societies, he argues, the division of labor among people was less developed, and social bonds were typically stronger. Hence, formal law was not required. In more developed societies, there is increased specialization and clearer division of labor among people, accompanied by lower social cohesiveness. Contract, rather than status or barter, has become the major form of exchange among people. The state apparatus now assures the fulfillment of the contract and establishes the external conditions for its use. A special class—lawyers—arose to negotiate and litigate the more complex and ever-increasing contractual relationships in modern society.

A second, more concrete aspect of the judicialization of politics is the expansion of the province of courts and judges in determining public policy outcomes, mainly through "ordinary" constitutional rights jurisprudence and the judicial redrawing of boundaries between state organs (e.g., the separation of powers, federalism). Not a single week passes by without a national high court somewhere in the world releasing a major judgment pertaining to the scope of constitutional rights protections or the limits on legislative or executive powers. Of these, the most common are cases dealing with classic civil liberties, primarily criminal due process rights, various aspects of the rights to privacy, and formal equality—all of which expand and fortify the boundaries of the constitutionally protected private

5. Jürgen Habermas, *Law as Medium and Law as Institution*, *in* Dilemmas of Law in the Welfare State 203-20 (Gunther Teubner ed., 1986); Juridification of Social Spheres (Gunther Teubner ed., 1987).

6. *See generally* Alec Stone Sweet, Governing with Judges: Constitutional Politics in Europe (2000); Alec Stone Sweet & Thomas L. Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 92 Am. Pol. Sci. Rev. 63 (1998).

7. Henry Sumner Maine, Ancient Law (Transaction Publishers 2001) (1866).

8. *See generally* Max Weber, Economy and Society: An Outline of Interpretive Sociology (Guenther Roth & Claus Wittich eds., Bedminster Press 1968) (1922).

9. *See generally* Emile Durkheim, The Division of Labor in Society (George Simpson trans., The Free Press 1964) (1893).

sphere, often perceived as threatened by the long arm of the encroaching state and its regulatory laws.[10]

Judicialization of public policy making through rights jurisprudence is perhaps most evident in the area of procedural justice. In many new constitutionalism countries, criminal due process cases account for roughly two-thirds of constitutional courts' rights cases.[11] The prevalence of due process rights is also evident in cases dealing with "process-light" measures adopted to combat terrorism. In 1999, the Israeli Supreme Court banned the use of torture in interrogations by Israel's General Security Services.[12] Peru's Constitutional Council annulled in 2002 the secret trial by a military tribunal of the leaders of the Shinning Path Maoist underground rebel movement.[13] The Law Lords declared unconstitutional Britain's post-9/11 state of emergency legislation.[14] In its recent ruling in *Hamdan v. Rumsfeld*, the U.S. Supreme Court quashed the Bush Administration's Guantánamo Bay military tribunals.[15]

Whereas the first type of judicialization may be described as "judicialization of social relations," judicialization of this second type focuses mainly on procedural justice and formal fairness in decision-making processes. Because it is often initiated by right claimants who challenge public policy decisions and practices, it may also be described as "judicialization from below." As Charles Epp suggests, the impact of constitutional catalogues of rights may be limited by individuals' inability to invoke them through strategic litigation.[16] Hence, bills of rights matter to the extent that a support structure for legal mobilization—a nexus of rights-advocacy organizations, rights-supportive lawyers and law schools, governmental rights-enforcement agencies, and legal aid schemes—is well developed. In other words, while the existence of written constitutional provisions is a necessary condition for the effective protection of rights and liberties, it is certainly not a sufficient condition. The effectiveness of rights provisions in planting the seeds of social change in a given polity is largely contingent upon the existence of a support structure for legal mobilization, and, more generally, socio-cultural conditions that are hospitable for such "judicialization from below."

Legal mobilization from below is aided by the commonly held belief that judicially affirmed rights are self-implementing forces of social change

10. Hirschl, Towards Juristocracy, *supra* note 2, at 103-18

11. *Id.*

12. *See* HCJ 5100/94 Pub. Comm. Against Torture in Isr. v. State of Isr. [1999] IsrSC 53(4) 817, 836, 838, 340.

13. *Retrial for Peru Shining Path Rebel*, BBC News, Nov. 21, 2002, http://news.bbc.co.uk/2/hi/americas/2497359.stm (last visited Oct. 15, 2006).

14. *See, e.g.*, A and others v. Sec'y of State for the Home Dep't, X and another v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [2005] 2 W.L.R. 87.

15. Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

16. *See generally* Charles R. Epp, The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective (1998).

removed from the constraints of political power. This belief has gained a near-sacred status in public discussion. The "myth of rights," as Stuart Scheingold termed it, contrasts the openness of judicial proceedings to the secret bargaining of interest group pluralism so as to underscore the integrity and incorruptibility of the judicial process.[17] "The aim, of course, is to enhance the attractiveness of legal and constitutional solutions to political problems."[18] This in turn may lead to a spread of populist "rights talk" and the corresponding impoverishment of political discourse.[19]

Another aspect of the second face of judicialization is the enforcement of procedural fairness through administrative review. The proliferation of administrative agencies in the modern welfare state has profoundly expanded the scope of administrative review by courts. More often than not, such judicial involvement in public policy making is confined to procedural aspects, focusing on process rather than substance. Drawing upon basic norms from contract law, constitutional law, and mainly administrative law, courts oversee and enforce the application of due process, equal opportunity, transparency, accountability, and reasonableness in public policy making. It is therefore not surprising that judicialization of this type dominates the justice system itself, from civil procedure to criminal due process; it is particularly noticeable in other process-heavy policy areas such as immigration, taxation, or public tenders. But it is also clearly evident in countless other areas, from urban planning and public health to industrial relations and consumer protection. Courts have also monitored important aspects of the privatization of government assets in the post-communist world. In short, the judicialization of public policy making in most constitutional democracies, either through rights jurisprudence or administrative review, comes close to virtually "governing with judges."[20]

Over the last few decades, the judicialization of public policy making has also proliferated at the international level, with the establishment of numerous transnational courts and quasi-judicial tribunals, panels, and commissions dealing with human rights, transnational governance, trade, and monetary affairs.[21] Perhaps nowhere is this process more evident than

17. *See* Stuart A. Scheingold, The Politics of Rights: Lawyers, Public Policy, and Political Change (2d ed. 2004).

18. *Id.* at 34.

19. *See* Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (1991).

20. *See* Carlo Guarnieri & Patrizia Pederzoli, The Power of Judges: A Comparative Study of Courts and Democracy (2002); Stone Sweet, *supra* note 6.

21. *See, e.g.*, Legalization and World Politics (Judith Goldstein et al. eds., 2001); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. Int'l L. & Pol. 709 (1999); Anne-Marie Slaughter, *Judicial Globalization*, 40 Va. J. Int'l L. 1103 (2000).

in Europe.[22] A similar process has taken place with respect to international trade disputes.[23] Decisions made by the World Trade Organization's (WTO) dispute settlement mechanism have had far-reaching implications for trade and commerce policies worldwide. This is also the case even in the United States, where compliance with unfavorable rulings by foreign tribunals has always been a tough sell. The 1994 North America Free Trade Agreement (NAFTA) also establishes quasi-judicial dispute resolution processes regarding foreign investment, financial services, and antidumping and countervailing instances. Similar arrangements were established by the Mercado Común del Sur agreement in South America and the Association of Southeast Asian Nations (ASEAN) in the Asia-Pacific region. In short, a large-scale transfer of crucial policy-making prerogatives from majoritarian decision-making arenas at the national level to relatively insulated transnational entities and tribunals has been rapidly established over the last few decades.

A third emerging class of the judicialization of politics is the reliance on courts and judges for dealing with what we might call "mega-politics": core political controversies that define (and often divide) whole polities. The judicialization of mega-politics includes a few subcategories: judicialization of electoral processes; judicial scrutiny of executive branch prerogatives in the realms of macroeconomic planning or national security matters (i.e., the demise of what is known in constitutional theory as the "political question" doctrine); fundamental restorative justice dilemmas; judicial corroboration of regime transformation; and, above all, the judicialization of formative collective identity, nation-building processes, and struggles over the very definition—or raison d'être—of the polity as such, arguably the most problematic type of judicialization from a constitutional theory standpoint. These emerging areas of judicialized politics expand the boundaries of national high-court involvement in the political sphere beyond the ambit of constitutional rights or federalism jurisprudence and take the judicialization of politics to a point that far exceeds any previous limit. More often than not, this trend is supported, either tacitly or explicitly, by powerful political stakeholders. The result has been the transformation of supreme courts worldwide into a crucial part of their respective countries' national policy-making apparatus. Elsewhere, I have described this process as a transition to *juristocracy*.[24]

It is difficult to overstate the profoundness of this transition. Whereas oversight of the procedural aspects of the democratic process—judicial monitoring of electoral procedures and regulations, for example—falls within the mandate of most constitutional courts, questions such as a

22. *See, e.g.*, Karen J. Alter, Establishing the Supremacy of European Law (2001); Stone Sweet, *supra* note 6; Joseph H.H. Weiler, The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration (1999).

23. Legalization and World Politics, *supra* note 21.

24. Hirschl, Towards Juristocracy, *supra* note 2, at 222-23.

regime's legitimacy, a nation's collective identity, or a polity's coming to terms with its often less than admirable past, reflect primarily deep moral and political dilemmas, not judicial ones. As such, they ought—at least as a matter of principle—to be contemplated and decided by the populace itself, through its elected and accountable representatives. Adjudicating such matters is an inherently and substantively political exercise that extends beyond the application of rights provisions or basic procedural justice norms to various public policy realms. Judicialization of this type involves instances where courts decide on watershed political questions that face a nation, despite the fact that the constitution of that nation does not speak to the contested issues directly, and despite the obvious recognition of the very high political stakes for the nation.[25] It is precisely these instances of judicialization of watershed national questions involving the intersection of very high political stakes with little or no pertinent constitutional guidelines that make the democratic credentials of judicial review most questionable. For it is ultimately unclear what makes courts the most appropriate forum for deciding such purely political quandaries.

The difference between the second and third face of judicialization is subtle, but it is important. It lies in part in the qualitative distinction between mainly procedural justice issues on the one hand, and substantive moral dilemmas or watershed political quandaries that the entire nation faces on the other. In other words, there seems to be a difference between the political salience of the judicialization of public policy making and the judicialization of mega-politics. Ensuring procedural fairness in public tenders is an important element of corruption-free public administration. Likewise, the scope of the right to a speedy trial is an important issue for people facing criminal charges. But its political salience is not nearly as significant as that of purely political issues such as the place of Germany in the European Union, the future of Quebec and the Canadian federation, the constitutionality of the post-apartheid political pact in South Africa, or that of affirmative action in the United States.

But the difference between the second and third level of judicialized politics goes beyond the question of political salience. It depends on our conceptualization of the "political." What counts as a "political" decision is not an easy question to answer. A political decision must affect the lives of many people. However, many cases that are not purely political (e.g., large class-action law suits) also affect the lives of many people. More importantly, since there is no plain and simple answer to the question "what is political?"—for many social theorists, the answer to that question would be "everything is political"—there cannot be a plain and simple definition of the judicialization of politics either. In other words, what Larry King

25. Jeremy Waldron, *Judicial Power and Popular Sovereignty*, *in* Marbury Versus Madison: Documents and Commentary 181, 195 (Mark A. Graber & Micheal Perhac eds., 2002).

would consider political is quite different from what Michel Foucault would consider political. Likewise, what may be considered a controversial political issue in one polity (say, the right to have an abortion in the United States) may be a nonissue in another polity. That said, there seems to be a qualitative difference between the political salience of (for example) a court ruling refining the boundaries of the right to fair hearing or reviewing the validity of federal quotas on agricultural export and a landmark judgment determining the legitimacy of a polity's regime or a nation's collective identity. Indeed, few decisions may be considered more "political" than authoritatively defining a polity's very raison d'être. That elusive yet intuitive distinction is what differentiates the judicialization of mega-politics from the first two levels of judicialization. Consider the following examples—all are seldom addressed by canonical constitutional theory, which is often preoccupied with matters American.

II. THE JUDICIALIZATION OF PURE POLITICS: A FEW ILLUSTRATIVE CASES

A. *The* Bush v. Gore *Scenario*

One of the politically salient arenas that has seen a dramatic judicialization over the last two decades is the electoral process, or what may be referred to as "the law of democracy."[26] Courts throughout the world of new constitutionalism are frequently called upon to decide on matters such as the redrawing of electoral districts, party funding, campaign financing, and broadcast advertising during election campaigns. In an increasing number of instances courts approve or disqualify political parties and candidates. Over the last few years, courts in a number of constitutional democracies—notably Belgium, Israel, India, Spain, and Turkey—have banned (or come close to banning) popular political parties from participating in national elections.[27] Only recently, the Supreme Court of Bangladesh ruled that voter lists drawn up for the upcoming elections in that country were invalid.[28] During the last decade alone, constitutional courts in over twenty-five countries have been called upon to determine the political future of prominent leaders through impeachment or disqualification trials. Whereas the Russian Constitutional Court, for example, enforced a constitutional limit on Russian President Boris Yeltsin's bid for a third term, the Colombian Supreme Court recently

26. *See, e.g.*, Samuel Issacharoff et al., The Law of Democracy: Legal Structure of the Political Process (1998); Russell A. Miller, *Lords of Democracy: The Judicialization of "Pure Politics" in the United States and Germany*, 61 Wash. & Lee L. Rev. 587 (2004).

27. Pildes, *supra* note 2, at 33. Belgium's High Court banned the Flemish right-wing separatist Vlaams Blok Party in November 2004. The party resurfaced as Vlaams Belang a few months later.

28. *Courting Danger: Democracy in the Lap of the Judges*, Economist, June 3, 2006, at 40.

approved a constitutional amendment that removed a provision prohibiting the reelection of government officials, allowing President Alvaro Uribe to run and ultimately be reelected for a second term.[29]

Courts have also become ultimate decision makers in disputes over national election outcomes—for example, in Zimbabwe (2002),[30] in Taiwan (2004),[31] in Ukraine (2004),[32] and in Italy (2006), where the Italian Supreme Court approved a win of fewer than 25,000 votes of center-left leader Romano Prodi over right-wing Silvio Berlusconi in one of Italy's closest elections.[33] Most recently, a series of election appeals and counter-appeals culminated in Mexico's Federal Electoral Court's dismissal of leftist runner-up Andres Manuel Lopez Obrador's claim of massive fraud in the July 2006 presidential election in that country.[34] The ruling formally granted right-wing candidate Felipe Calderon the 2006-2012 presidency following an electoral win by less than a 0.6% margin. Even the fate of elections in the exotic island nations of Madagascar and Trinidad and Tobago have been determined by judicial tribunals.[35] Clearly, the *Bush v. Gore* courtroom struggle over the fate of the American presidency was anything but an idiosyncratic moment in the recent history of comparative constitutional politics.[36]

29. *Uribe Wins Colombia Court Ruling, Allowing Him to Seek Second Term*, Bloomberg News Online, Oct. 19, 2005, http://www.bloomberg.com/apps/news?pid=10000086&sid=aaT.v1TYrNZ0.

30. *See* Legal Resources Found., Justice in Zimbabwe (Report), http://www.swradioafrica.com/Documents/RDC_report.htm (last visited Sept. 20, 2006).

31. *See* Chris Hogg, *Taiwan Court to Rule On Election*, BBC News Online, Nov. 4, 2004, http://news.bbc.co.uk/2/hi/asia-pacific/3978921.stm.

32. *See, e.g.*, Decision of the Ukrainian Constitutional Court of Dec. 3, 2004 (invalidating the presidential election results of November 2004 and ordering a new election). For the English translation, see http://www2.pravda.com.ua/en/archive/2004/december/3/5.shtml; *see also* Decision of the Ukrainian Constitutional Court of Dec. 24, 2004, *available at* http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=v022p710%2D04 (regarding the constitutionality of the Presidential Elections Act); Decision of the Ukrainian Constitutional Court of Dec. 26, 2004, *available at* http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=n0119700%2D04 (responding to Victor Yanukoyvich's claim regarding the violation of disabled voters' rights in the 2004 election).

33. *See Italian Court Rules Prodi Election Winner*, Guardian Unlimited, Apr. 19, 2006, *available at* http://www.guardian.co.uk/italy/story/0,,1756970,00.html.

34. The decision was released on September 4, 2006. See *Mexico Court Rejects Fraud Claim*, BBC News Online, Aug. 29, 2006, http://news.bbc.co.uk/2/hi/americas/5293796.stm. For further discussion of Mexico's Federal Electoral Court, see Stephen Zamora et al., Mexican Law 196-97 (2004).

35. *See* Bobb and Anor. [2006] UKPC 22 (Trin. & Tobago), *available at* http://www.bailii.org/uk/cases/UKPC/2006/22.html; *Madagascar Court Annuls Election*, BBC News Online, Apr. 17, 2002, http://news.bbc.co.uk/2/hi/africa/1935247.stm.

36. *See generally* Richard Hasen, *A Critical Guide to* Bush v. Gore *Scholarship*, 7 Ann. Rev. Pol. Sci. 297 (2004); Hirschl, Bush v. Gore, *supra* note 2; Pildes, *supra* note 2.

B. *Core Executive Prerogatives*

Another political area that has been increasingly judicialized is core prerogatives of legislatures and executives in foreign affairs, national security, and fiscal policy. The Supreme Court of Canada (SCC) was quick to reject the "political question" doctrine (non-justiciability of explicitly political questions) following the adoption of the Canadian Charter of Rights and Freedoms in 1982.[37] In its landmark ruling in *Operation Dismantle v. The Queen*, for example, the Court unanimously held that "[i]f a case raises the question of whether executive or legislative action violated the Constitution, then the question has to be answered by the Court, regardless of the political character of the controversy . . . . Disputes of a political or foreign policy nature may be properly cognizable by the courts."[38] Not surprisingly, the SCC has become a key decision-making body on core political questions ranging from the future of Quebec to the future of health care policy in Canada.[39]

The newly established Russian Constitutional Court followed suit in the *Chechnya Case* when it agreed to hear petitions by a number of opposition members of the Duma, who challenged the constitutionality of three presidential decrees ordering the Russian military invasion of Chechnya.[40] Rejecting Chechnya's claim to independence and upholding the constitutionality of President Boris Yeltsin's decrees as *intra vires*, the majority of the judges of this court stated that maintaining the territorial integrity and unity of Russia was "[a]n unshakable rule that excludes the possibility of a unilateral armed secession in any federative state."[41] In 2004, the Israeli Supreme Court went on to rule on the constitutionality and compatibility with international law of the West Bank barrier—a

37. On the demise of the "political question" doctrine in the United States, see generally Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. Rev. 1203 (2002).

38. Operation Dismantle v. The Queen, [1985] 1 S.C.R. 441.

39. *See, e.g.*, Chaoulli v. Que. (Att'y Gen.), [2005] 1 S.C.R. 791 (holding that limits on the delivery of private health care in Quebec violated Quebec's Charter of Human Rights and Freedoms). Three of the judges also ruled that the limits on private health care violated section 7 of the Charter of Rights and Freedoms. *See id.* The decision could have significant ramifications on health care policy in Canada, and may be interpreted as paving the way to a so-called "two-tier" health care system.

40. *See Russian Federation Constitutional Court's Ruling Regarding the Legality of President Boris Yeltsin's Degree To Send Troops To [Chechnya]*, (Official Kremlin International News Broadcast July 31, 1995). English-language analysis of the case is provided by William E. Pomeranz, *Judicial Review and the Russian Constitutional Court: The Chechen Case*, 23 Rev. Cent. & E. Eur. L. 9 (1997).

41. *Russian Court: Chechen War Legal*, United Press Int'l, July 31, 1995, *available at* Lexis UPI database; *see also* Paola Gaeta, *The Armed Conflict in Chechnya Before the Russian Constitutional Court*, 7 Eur. J. Int'l L. 563 (1996).

controversial network of fences and walls separating Israel from Palestinian territory.[42]

A slightly different, yet equally telling, manifestation of judicial intervention in the political sphere—this time in the context of national fiscal and welfare policy—can be found in the 1995 *Austerity Package Decisions* (the so-called "Bokros cases") by the Hungarian Constitutional Court.[43] Here, the court drew upon the concepts of reliance interest and legal certainty to strike down some twenty-six provisions of a comprehensive economic emergency plan introduced by the government, the major thrust of which was a substantial cut in the government's expenditures on welfare benefits, pension allowances, education, and health care in order to reduce Hungary's enormous budget deficit and foreign debt.[44] An equally significant manifestation of the judicialization of contentious macroeconomic matters is the Supreme Court of Argentina's October 2004 ruling (the so-called "Corralito Case") on the constitutionality of the government's "pesification" plan (total convergence of the Argentine economy into pesos with a fixed exchange rate vis-à-vis U.S. dollars), and the corresponding devaluation and freezing of savings deposits nominated in U.S. dollars—a fall-out from Argentina's major economic crisis of 2001.[45]

While there has been increased judicial penetration into the core prerogatives of legislatures and executives pertaining to foreign affairs, national security, and fiscal policy, courts have by and large remained passive with respect to social policy and redistribution of wealth and resources. With very few exceptions (mainly South Africa and India), courts have shied away from advancing progressive notions of distributive justice in arenas such as income distribution, eradication of poverty, or subsistence rights (e.g., basic education, health care, or housing), all of which require wider state intervention and changing public expenditure priorities.[46] For Keynesians and progressives, the judicialization of core executive prerogatives has therefore been a mixed blessing.

C. *Corroboration of Regime Change*

Another emerging area of judicial involvement in mega-politics is the (in)validation of regime change. The most obvious example is the

42. HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Isr. [2005] IsrSC 58(5) 807, *translated in* 38 Isr. L. Rev. 83 (2005).

43. An English translation of this case is available in Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court 322-32 (László Sólyom & Georg Brunner eds., 2000).

44. *See id.*

45. Corte Suprema de Justicia [CSJN], 26/10/2004, "Bustos, Alberto Roque et al. v. Estado Nacional et al. / amparo," *available at* http://www.csjn.gov.ar (Arg.).

46. Ran Hirschl, *Constitutionalism, Judicial Review, and Progressive Change: A Rejoinder to McClain and Fleming*, 84 Tex. L. Rev. 471, 485-502 (2005).

"constitutional certification" saga in South Africa: This was the first time a constitutional court refused to accept a national constitutional text drafted by a representative constitution-making body.[47] Other recent manifestations of this type of judicialization include the rarely acknowledged yet astonishing restoration of the 1997 Fijian constitution by the Fijian Court of Appeal in *Fiji v. Prasad* in 2001—the first time in the history of modern constitutionalism that a polity's high court restored a constitution and the democratic system of government that created it;[48] the landmark February 2006 ruling by the Supreme Court of Nepal, which declared unconstitutional the controversial Royal Commission for Corruption Control (RCCC) established following the royal coup of 2005, thereby paving the way for the release of ousted Prime Minister Sher Bahadur Deuba, who had been detained since July 2005 on the RCCC's orders;[49] and the 2004 dismissal by the Constitutional Court of South Korea of the impeachment of President Roh Moo-hyun by South Korea's National Assembly—the first time in the history of modern constitutionalism that a president impeached by a legislative body has been reinstated by a judicial body.[50]

A case in point here is the Pakistani Supreme Court's appraisal of the very legitimacy of the military coup d'état of 1999. Charging runaway corruption and gross economic mismanagement by the government, General Pervez Musharraf seized power from Prime Minister Nawaz Sharif in a military coup d'état on October 12, 1999. Musharraf declared himself the country's new Chief Executive, detained Prime Minister Sharif and several of his political allies, and issued a Proclamation of Emergency that suspended the operation of Sharif's government, Pakistan's National Assembly, and its Senate. In response, political activists opposed to the military coup filed a petition to the Supreme Court in mid-November 1999, challenging the legality of the overthrow of Sharif's government and the Proclamation of Emergency, and demanding that Nawaz Sharif be released and his elected government be reinstated. In a widely publicized decision released in May 2000, the Pakistan Supreme Court drew upon the doctrine of "state necessity" to unanimously validate the October 1999 coup as having been necessary to spare the country from chaos and bankruptcy.[51] The Court held that

47. *See Certification of the Amended Text of the Constitution of the Republic of S. Afr.* 1997 (2) SA 97 (CC); *Certification of the Constitution of the Republic of S. Afr.* 1996 (4) SA 744 (CC) .

48. *See* Republic of Fiji Islands v. Prasad [2001] 1 LRC 665 (HC), [2002] 2 LRC 743 (CA).

49. *See Nepal Corruption Panel Outlawed*, BBC News, Feb. 13, 2006, http://news.bbc.co.uk/2/hi/south_asia/4708472.stm.

50. Youngjae Lee, *Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective*, 53 Am. J. Comp. L. 403, 403 (2005).

51. Zafar Ali Shah v. Pervez Musharraf, Chief Executive of Pak., P.L.D. 2000 S.C. 869.

> [o]n 12th October, 1999, a situation arose for which the Constitution provided no solution and the intervention by the Armed Forces through an extra constitutional measure became inevitable, which is hereby validated on the basis of the doctrine of State necessity and the principle of *salus populi suprema lex* . . . . [S]ufficient corroborative and confirmatory material has been produced . . . in support of the intervention by the Armed Forces through extra-constitutional measure.[52]

However, Chief Justice Irshad Hasan Khan added that "prolonged involvement of the Army in civil affairs runs a grave risk of politicizing it, which would not be in national interest, therefore, civilian rule in the country must be restored within the shortest possible time."[53] Accordingly, the court granted General Musharraf three years to accomplish economic and political reforms and to restore democracy.[54] The court announced that General Musharraf (President Musharraf as of June 2001) should choose a date no later than ninety days before the end of the three-year period for the holding of elections to the National Assembly, the provincial assemblies, and the Senate.[55] Pakistan is a country in a near-constant political limbo. One thing is clear, though—the courtroom battle over the political legitimacy of the Musharraf regime reemphasized the key political role played by the Supreme Court in present-day Pakistan.[56]

D. *Transitional Justice*

A fourth emerging area of mega-politics that has been rapidly judicialized to what may be an excessive degree over the past few decades is that of transitional or restorative justice. The increasingly common transfer from the political sphere to the courts of fundamental moral and political dilemmas concerning extreme injustices and mass atrocities committed against historically disenfranchised groups and individuals involves a few subcategories that reflect different notions of restorative justice. There are many recent examples of the judicialization of restorative justice. Recall the post-apartheid era in South Africa: The amnesty-for-confession formula had been given a green light by the South African Constitutional Court in *Azanian Peoples' Organization ("AZAPO") v. President of the Republic of South Africa* (1996) upholding the establishment of the quasi-judicial Truth and Reconciliation Commission.[57]

52. *Id.* at 1219.
53. *Id.*
54. *Id.* at 1219-23.
55. *Id.* at 1223.
56. Since 1990 Pakistan has known five regime changes, and the Pakistan Supreme Court has played a key role in each of these radical transitions. *See, e.g.*, Zafar Ali Shah v. Pervez Musharraf, Chief Executive of Pak., P.L.D. 2000 S.C. 869; Benazir Bhutto v. President of Pak., P.L.D. 1998 S.C. 388; Muhammad Nawaz Sharif v. President of Pak., P.L.D. 1993 S.C. 473; Begum Nusrat Bhutto v. Chief of Army Staff, P.L.D. 1977 S.C. 657.
57. *Azanian Peoples' Organization ("AZAPO") v. President of the Republic of S. Afr.* 1996 (4) SA 672 (CC).

Or consider the major role played by the newly established constitutional courts in post-communist Europe in confronting their respective countries' pasts through the trials of former office holders who committed what are now considered to be human rights violations during the communist era.[58] Likewise, there has been a widespread judicialization of restorative justice in post-authoritarian Latin American countries (consider for example the legal battle over the fate of Augusto Pinochet, Chile's former dictator). Yet another example would be the wholesale judicialization of the battle over the status of indigenous peoples in so-called "settler societies" like Australia, Canada, and New Zealand.

The judicialization of restorative justice is also evident at the transnational level. Here, too, there are many examples. The International Criminal Court (ICC) (ratified by 90 countries as of 2006) was established in 1998 as a permanent international judicial body with potentially universal jurisdiction pertaining to genocide, crimes against humanity, war crimes, and so on.[59] The International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague was established in 1993;[60] this is the tribunal where Slobodan Milosevic was put to trial.[61] Another example is the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania, established in 1995. Also included in this category are the recently established "hybrid courts" in Cambodia, East Timor, Iraq, Kosovo, and Sierra Leone, which are all international restorative justice tribunals working within the rules and regulations of the domestic legal system and applying a compound of international and national, substantive and procedural, law.

E. *Defining the Nation via Courts*

But all of these areas of judicialized pure or mega-politics are merely an introduction to what is arguably the clearest manifestation of the wholesale judicialization of core political controversies—the growing reliance on courts for contemplating the very definition, or raison d'être, of the polity. Consider for example, the unprecedented involvement of the Canadian judiciary in dealing with the status of bilingualism and the political future of Quebec and the Canadian federation, including the Supreme Court of Canada's landmark ruling in the *Quebec Secession Reference*—the first time a democratic country had ever tested in advance the legal terms of its

58. *See, e.g.*, Herman Schwartz, The Struggle for Constitutional Justice in Post-Communist Europe (2000); Peter E. Quint, *Judging the Past: The Prosecution of East German Border Guards and the GDR Chain of Command*, 61 Rev. Pol. 303 (1999).

59. *See* William Schabas, An Introduction to the International Criminal Court (Cambridge Univ. Press 2004) (2001).

60. *See* Rachel Kerr, The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy (2004).

61. *Id.*

own dissolution.[62] Likewise, the German Federal Constitutional Court has played a key role in the creation of the unified Germany, illustrated for example in the *Maastricht Case*, where the Court drew upon Basic Law provisions to determine the status of post-unification Germany vis-à-vis the emerging European supranational polity.[63] There are many other examples of this phenomenon: The central role the Turkish Constitutional Court has played in preserving the strictly secular nature of Turkey's political system by continually outlawing anti-secularist political forces and parties; the landmark jurisprudence of the Supreme Court of India pertaining to the status of Muslim and Hindu religious personal laws;[64] the crucial role of courts in diverse constitutional theocracies, such as Egypt or Malaysia, in determining the nature of public life in these modern states formally governed by principles of Islamic *Shari'a* laws;[65] the wholesale transfer of the deep religious/secular cleavage in Israeli society to the Israeli judiciary through the judicialization of the question of "who is a Jew?" and the corresponding entanglement of the Israeli Supreme Court in interpreting Israel's fundamental definition as a "Jewish and Democratic State."[66] At the supranational level, one can think of the key role the European Court of Justice has played in enforcing and accelerating the process of European integration—a role that is only bound to increase with the 2004 EU eastward expansion and the possibility of an EU Constitution.

To better appreciate the purely political nature of these judgments, a more detailed discussion of a few illustrative cases is warranted. Let us begin with Europe. In the landmark *Maastricht Case*, the German Federal Constitutional Court was asked to draw upon Germany's Basic Law provisions to determine the status of post-unification Germany vis-à-vis the emerging European supranational polity.[67] Article 38 of the Basic Law confers on German citizens the right to vote for their parliamentary representatives.[68] Article 20(2) of the Basic Law confers on citizen-voters the right to participate in the exercise of state authority through their parliamentary deputies.[69] The petitioners argued that the creation of the

62. *See infra* notes 92-105 and accompanying text.

63. *See infra* notes 67-71 and accompanying text.

64. *See, e.g.*, Mohammed Ahmed Khan v. Shah Bano Begum, A.I.R. 1985 S.C. 945 (India).

65. For a discussion of the role of courts in Egypt, see Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 Tex. L. Rev. 1819, 1829-33 (2004). For Malaysia, see Michael G. Peletz, Islamic Modern: Religious Courts and Cultural Politics in Malyasia (2002).

66. *See infra* notes 83-91 and accompanying text.

67. An abbreviated English version of the ruling appears in Donald P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany 182-86 (1997); *see also id.* at 187-93 (discussing the *National Unity Election Case*, which deals with the post-unification amalgamation of the different electoral systems of the two Germanies).

68. Grundgesetz [GG] [Constitution] art. 38 (F.R.G.), *available at* http://www.bundestag.de/htdocs_e/info/germanbasiclaw.pdf.

69. *Id.* art. 20(2).

European Union through the Maastricht Treaty of 1992 implied a transfer of policy-making authority from the national level to the supranational level, thereby placing a considerable amount of policy-making authority beyond the ambit of national legislators. Specifically, the transfer of policy-making authority to the European Union constituted a relinquishment of power by the Bundestag, thereby infringing upon the right of German citizens to influence the exercise of state power through the act of voting. And so, once again, a national high court was called upon to clarify and settle a fundamental political controversy, this time concerning the inter-relationships between the German voter, the Bundestag, and the emerging supranational European polity.

In its decision, the German Federal Constitutional Court addressed at great length the rationale behind the creation of a supranational European community, and stipulated the necessary conditions for generating democratic legitimacy at the supranational level. The court went on to define the legislative purview of member states and national parliaments vis-à-vis the EU, and stated that the Bundestag should retain functions and powers of substantial importance. Moreover, the court stated that "Article 38 of the Constitution is breached if an act opens up the German legal system to the application of the law of the supranational European Communities [if that act] does not establish with sufficient certainty what powers are transferred and how they will be integrated."[70] The court also held that fundamental democratic principles of political participation and representation did not pose a bar to German membership in the EU as long as the transfer of power to such bodies "remain[ed] rooted in the right of German citizens to vote and thus to participate in the national lawmaking process."[71] In other words, the court did not shy away from dealing with an explicitly political question. Rather, it upheld the constitutionality of the Maastricht Treaty—the constitutive document of the "ever closer union" notion—specifically placing the treaty under the judgment of German Basic Law and its principles.

Another telling example of judicial articulation of a nation's core values is the central role played by Egypt's Supreme Constitutional Court in dealing with the core question of the status of *Shari'a* rules—arguably the most controversial and fundamental collective identity issue troubling the Egyptian polity. Since the 1979 establishment of judicial review in Egypt[72] and the 1980 constitutional amendment that made Islamic *Shari'a* the principal source of legislation in that country,[73] the court has increasingly been called upon to determine the constitutionality of legislative and administrative acts on the basis of their adherence to the principles of the

70. Kommers, *supra* note 67, at 185-86.
71. *Id.* at 182.
72. *See* Hirschl, *supra* note 65, at 1822-23.
73. Egypt Const. ch. I, art. 2, *available at* http://www.egypt.gov.eg/english/laws/constitution/index.asp.

Shari'a.[74] "The question before the Court in all of these cases has been which principles of the *Shari'a* possess determinative and absolute authority."[75]

To address this question in a moderate way, the court developed a complex interpretative matrix of religious directives—the first of its kind by a nonreligious tribunal. It departed from the ancient traditions of the *fiqh* (Islamic jurisprudence or the cumulative knowledge/science of studying the *Shari'a*) schools, and has instead developed a new framework for interpreting the *Shari'a*.[76] Specifically, the court has developed a flexible, modernist approach to interpreting the *Shari'a* that distinguishes between "unalterable and universally binding principles, and malleable applications of those principles."[77] Legislation that contravenes a strict, unalterable principle is declared unconstitutional and void, while at the same time, *ijtihad* (contemplation or external interpretation) is permitted in cases of textual lacunae, or where the pertinent rules are vague or open-ended.[78] Furthermore, the government has been given broad legislative discretion in policy areas where the *Shari'a* is found to provide unclear or multiple answers, provided that the legislative outcome does not contravene the general spirit of the *Shari'a*.[79] This interpretive approach has marked a true shift in the paradigm for legitimizing government policies based upon a moderate, fairly liberal interpretation (*ijtihad*) of the *Shari'a*.

The court applied this interpretive approach in the *Riba Case*,[80] the landmark *Niq'ab Case*[81] and in the groundbreaking *Khul' Case* where the Court upheld the constitutionality of the Personal Status Law of 2000, including the provisions establishing a Muslim woman's right to invoke *khul'*—divorce on any grounds without her husband's consent—so long as the groom's gifts of jewelry (*shabka*) and dowry payments (*mahr*) are

74. *See* Hatem Aly Labib Gabr, *The Interpretation of Article Two of the Egyptian Constitution by the Supreme Constitutional Court*, *in* Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt 217, 217 (Kevin Boyle & Adel Omar Sherif eds., 1996).

75. Hirschl, *supra* note 65, at 1823.

76. *See* Nathan J. Brown, *Islamic Constitutionalism in Theory and Practice*, *in* Democracy, the Rule of Law and Islam 491 (Eugene Cortan & Adel Omar Sherif eds., 1999).

77. *Id.* at 496.

78. *Id.*

79. *Id.* at 497.

80. President of al-Azhar Univ. v. President of the Republic (the *Riba Case*), No. 20 of the 1st judicial year (May 4, 1985), is discussed in, Frank E. Vogel, *Conformity with Islamic Shari'a and Constitutionality Under Article 2: Some Issues of Theory, Practice and Comparison*, *in* Democracy, the Rule of Law and Islam, *supra* note 76, at 525, 534.

81. Wassel v. Minister of Education (the *Niq'ab Case*), No. 8 of the 17th judicial year (May 18, 1996), *translated in* 3 Yearbook of Islamic & Middle Eastern Law 177, 178-80 (Eugene Cotran & Chibli Mallat eds., 1996) (upholding the constitutionality of a government decree that permitted persons responsible for female pupils below university level to request that they cover their hair, provided that the covers did not hide their faces (i.e. that they wear a *hijab* (head cover) and not a *niqab* (mask or full head cover)).

returned, and certain financial rights are relinquished.[82] Delivering the court's judgment, Justice Maher El-Bahri confirmed that the incorporation of *Khul'* into Egyptian personal status law did not violate the *Shari'a* or article 2 of the constitution, as there were definitive Qur'anic verses and corresponding *fiqh* supporting the *khul'* procedure.

In these and other landmark judgments concerning the scope of *Shari'a* in Egypt's public life, the court engaged in an autonomous substantive interpretation of both the *Qur'an* and evidence available on *Sunna*. In fact, the court established its own interpretation of *ijtihad* irrespective of the contradictory opinions in Islamic jurisprudence, the *fiqh*, and its traditional methods. The Egyptian Supreme Constitutional Court thereby positioned itself as a de facto interpreter of religious norms, and as a major forum for dealing with Egypt's dilemma of constitutional theocracy.

Perhaps nowhere in the world is the judicialization of mega-politics more evident than in neighboring Israel—probably the closest country on the planet to a full-fledged juristocracy. Not a single week passes by without the Supreme Court of Israel (SCI) issuing a key ruling that is widely reported by the media and closely watched by the political system. The clearest examples of the SCI's deep entanglement with formative questions of collective identity are its recent rulings concerning the question of "who is a Jew"—arguably the most charged question pertaining to collective identity in present-day Israel. The Orthodox stream of Judaism has been the sole branch of Judaism formally recognized by the state. This exclusive status has enabled the Orthodox community to establish a near monopoly over the supply of public religious services, as well as to impose rigid standards on the process of determining "who is a Jew." This question has crucial symbolic and practical implications, as according to Israel's Law of Return, Jews who immigrate to Israel are entitled to a variety of benefits, including the immediate right to full citizenship.[83] Non-Jewish immigrants are not entitled to these benefits. Since being Jewish is sufficient to qualify for citizenship, the state's self-definition as a Jewish state is inextricably caught up with defining "who is a Jew." Not surprisingly the conversion battle has been watched very closely by Jews within and outside Israel.

As with other contested political affairs in Israel, the political system's inability or unwillingness to deal with the issue (aided by the incredibly

82. The new law allowed this divorce by court order (i.e., without the husband's consent) after a mandatory mediation and reconciliation process failed. These new provisions effectively outlawed the abusive practice of men divorcing their wives by simply pronouncing "I divorce thee" (*talaq al-bid'a*) three times, bypassing any efforts to mediate or reconcile partners (*talaq al-ghyabi*). *See Khul' Law Passes Major Test*, Al-Ahram Weekly On-line, Dec. 19-25, 2002, http://weekly.ahram.org.eg/2002/617/eg11.htm.

83. The Law of Return, 1970, S.H. 586 (Isr.), *available at* http://www.knesset.gov.il/laws/special/eng/return.htm (providing Jews with the right to "return" to Israel to take up citizenship, even if they have had no previous contact with the state).

lenient standing and access rights to the SCI) brought the question of "who is a Jew" to the SCI. In 1989, when the constitutional revolution initiative was in its formative stages, the SCI held that for purposes of immigration, any person who converted to Judaism outside Israel, whether under the auspices of an Orthodox, Conservative, or Reform religious institution, was automatically entitled to all the rights of an *oleh* (Jewish immigrant), as stated in the Law of Return and the Citizenship Law.[84] In 1995, the SCI was once again drawn into the muddy waters of identity politics. This time, the question before the SCI was whether a non-Jewish person who underwent non-Orthodox conversion in Israel was entitled to automatic citizenship based on the right of return. The SCI avoided giving a clear answer while explicitly reaffirming its earlier ruling validating non-Orthodox conversions made abroad.[85]

Following this ruling, an increasing number of non-Jewish persons residing in Israel (primarily foreign workers and non-Jewish immigrants from the former Soviet Union) went abroad to pursue non-Orthodox conversion in order to claim the benefits awarded by the state to those newcomers recognized as Jews. In response, the Ministry of the Interior (then controlled by the ultra-Orthodox *Shas* party) renewed its refusal to recognize Reform and Conservative conversions to Judaism made abroad. In November 1999, the SCI revisited the issue by stating that if the involved parties had failed to reach a settlement by April 2000, an expanded panel of eleven judges would address the conversion issue soon thereafter. No agreeable compromise was reached by the deadline, and the SCI resumed its deliberation on the issue later that year. The judicialization of the conversion question culminated in early 2002 with the SCI's historic decision (nine to two) to recognize non-Orthodox conversions to Judaism performed abroad.[86] The SCI ordered the Ministry of the Interior to register as Jews Israeli citizens who were converted by the Conservative or Reform movements abroad.[87] In its reasoning, the SCI drew upon a longstanding convention whereby the Ministry's Population Registry refrains from questioning Israeli citizens about the details of their beliefs.[88]

In March 2005, the SCI delivered yet another landmark judgment on a question that cuts to the heart of the Jewish state's collective identity.[89] A

84. HCJ 264/87 Sepharadi Torah Guardians-Shas Movement v. Population Registrar [1989] IsrSC 43(2) 723, 731.

85. *See* HCJ 1031/93 Pessaro (Goldstein) et al. v. Minister of the Interior [1995] IsrSC 49(4) 661.

86. HCJ 5070/95 Working and Volunteering Women Movement vs. Minister of Interior [2002] IsrSC 56(2) 721.

87. *See id.*

88. *See id.*

89. *See* Yuval Yoaz, *Court Recognizes Non-Orthodox Overseas Conversion of Israeli Residents*, Haaretz, Jan. 4, 2005, *available at* http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=559673&contrassID=1&subContrassID=1&sbSubContrassID=0&listSrc=Y.

group of foreign workers residing in Israel studied for Reform and Conservative conversions in Israel, but had the actual ceremonies performed abroad in an attempt to circumvent the State's exclusive recognition of Orthodox conversions within Israel. The Ministry of the Interior objected to these "bypass" conversions (known in Israel as "leaping conversions" as they require a brief "jump" to a foreign jurisdiction), arguing that the Law of Return did not apply to foreigners already living in Israel, and that bypass conversions were effectively not overseas conversions at all. In a seven-to-four ruling, the SCI sided with the petitioners and agreed to recognize non-Orthodox "bypass" conversions to Judaism performed de jure abroad but de facto in Israel. The SCI held that a person who came to Israel as a non-Jew and, during a period of lawful residence here, underwent conversion in a recognized Jewish community abroad will be considered Jewish. SCI President Aharon Barak wrote,

> The Jewish nation is one . . . . It is dispersed around the world, in communities. Whoever converted to Judaism in one of these communities overseas has joined the Jewish nation by so doing, and is to be seen as a "Jew" under the Law of Return. This can encourage immigration to Israel and maintain the unity of the Jewish nation in the Diaspora and in Israel.[90]

Recall that this was supposed to be a court ruling, not a political speech or manifesto.[91]

Another textbook example of the judicialization of mega-politics is provided by the unprecedented involvement of the Supreme Court of Canada in dealing with the status of bilingualism and the political future of Quebec and the Canadian federation, most notably by the Court's landmark ruling in the *Reference re Succession of Quebec*.[92] What makes the *Reference re Succession of Quebec* so unique is not only the fact that it was the first time a democratic country had ever tested in advance the legal

90. *Id.*

91. Compare this clear manifestation of the judicialization of foundational collective identity questions (the third face of judicialization) with more routine aspects of the very same identity questions (the second face of judicialization): Fred is converted to Judaism by an Orthodox Rabbi, who, because he is tired that day, makes a procedural mistake or two during the process. One week later, the Rabbi realizes his error and insists that Fred goes through the proper procedure. Fred says no and the debate reaches the courts. Although the legal struggle involves aspects of the "who is a Jew" question, these are incidental to the mainly procedural question at stake. I thank Mark Graber for clarifying this point for me.

92. Reference re Secession of Que., [1998] 2 S.C.R. 217; *see also* A.G. (Que.) v. Que. Protestant Sch. Bds., [1984] 2 S.C.R. 66 (affirming the unconstitutionality of provisions regarding English instruction); Reference re Objection to Resolution to Amend the Constitution, [1982] 2 S.C.R. 793 (holding that Quebec did not have the power to veto constitutional amendments affecting the legislative competence of Quebec); Re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753 (holding that from a purely legal standpoint the Houses of the Parliament of Canada could request the amendment of the Canadian Constitution unilaterally, although a constitutional convention exists that requires substantive consent by the provinces).

terms of its own dissolution, but also the liberty the court took to articulate with authority the fundamental pillars of the Canadian polity in a way no other state organ has ever done before. In September 1996, following a slim 50.6% to 49.4% loss by the Quebecois secessionist movement in the 1995 referendum, the Canadian federal government drew upon the reference procedure to ask the Supreme Court of Canada to determine whether a hypothetical unilateral secession declaration by the Quebec government would be constitutional. In the reference submitted by Ottawa to the Supreme Court, three specific questions were asked: "(1) Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally? (2) Does international law give the National Assembly, legislature, or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?" In other words, is there a right to self-determination under international law that applies to Quebec? (3) If there is a conflict between international law and the Canadian Constitution on the secession of Quebec, which takes precedence?[93]

In a widely publicized ruling in August 1998, the SCC unanimously held that unilateral secession would be an unconstitutional act under both domestic and international law, and that a majority vote in Quebec was not sufficient to allow Quebec to separate legally from the rest of Canada.[94] However, the court also noted that if and when secession was approved by a clear majority of people in Quebec voting in a referendum on a clear question, the parties should then negotiate the terms of the subsequent breakup in good faith.[95] As for the question of unilateral secession under Canadian law, the court's answer provided both federalists and separatists with congenial answers.

In strictly legal terms, the court ruled that the secession of Quebec would involve a major change to the constitution of Canada that would require an amendment to the constitution, which in turn would require negotiations among all involved parties.[96] On the normative level, the court stated that the Canadian constitution is based on four equally significant underlying principles: (1) federalism, (2) democracy, (3) constitutionalism and the rule of law, and (4) the protection of minorities.[97] None of these principles trumps any of the others.[98] Hence, even a majority vote (i.e., strict adherence to the fundamental democratic principle of majority rule) would not entitle Quebec to secede unilaterally.[99] However, the court stated that if a clear majority of Quebecois voted "oui/yes" to an unambiguous question

93. Reference re Secession of Que., [1998] 2 S.C.R. at 228.
94. *Id.* at 259-60.
95. *Id.* at 293.
96. *Id.*
97. *Id.* at 247-63.
98. *Id.* at 248.
99. *Id.* at 259-61.

on Quebec separation, this would "confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means."[100] Such "a clear majority on a clear question" would require the federal government to negotiate in good faith with Quebec in order to reach an agreement on the terms of separation.[101]

As for international law, the court's answer was much shorter and less ambiguous; it found that although the right of self-determination of peoples did exist in international law, it did not apply to Quebec.[102] While avoiding the contentious question of whether the Quebec population or part of it constituted a "people" as understood in international law, the court held that the right to unilateral secession did not apply to Quebec; the Quebecois are neither denied their rightful ability to pursue their "political, economic, social and cultural development within the framework of an existing state," nor do they constitute a colonial or oppressed people.[103]

The government of Quebec responded to the judgment by enacting a bill stating that if a majority of "50% plus one" of those Quebecois who cast ballots in a provincial referendum on the future of Quebec supported the idea of secession, this would satisfy the requirement for "a clear majority" set by the court decision. The federal government, on its part, responded in late 1999 by proposing the "Clarity Bill," formally confirmed by Parliament in summer 2000.[104] In a nutshell, the bill states that only "a clear majority on a clear question" would require the federal government to negotiate the terms of separation with Quebec; that, given the nature of the question at stake, the term "clear majority" should mean more than "50% plus one"; and that, in any event, the federal government reserves the right to determine whether the question posed by the Quebec government in a future referendum met the "clear question" criterion.[105]

Without the political context to make sense of these events and rulings, the non-Canadian reader may find this chain of judicial events regarding the status of Quebec somewhat perplexing. However, one thing is indisputable: Over the past twenty-five years, the SCC has become one of the most important public forums for dealing with the highly contentious issue of Quebec's status and its future relationship with the rest of Canada. Drawing upon the new constitutional framework established by the Constitution Act, 1982 and the SCC's willingness to play a central role in the Quebec saga, the involved parties (primarily the federalists) were able to

100. *Id.* at 265.
101. *Id.* at 271.
102. *Id.* at 277.
103. *Id.* at 282.
104. Clarity Act, 2000 S.C., ch. 26 (Can.). This Act "give[s] effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference." *Id.*
105. *Id.*

gradually transfer the question of Quebec from the political sphere to the judicial sphere.

In summary, in numerous countries throughout the world there has been a growing legislative deference to the judiciary, an increasing intrusion of the judiciary into the prerogatives of legislatures and executives, and a corresponding acceleration of the process whereby political agendas have been judicialized. Together, these developments have helped bring about a growing reliance on adjudicative means for clarifying and settling fundamental moral controversies and highly contentious political questions, and have transformed national high courts into major political decision-making bodies. The wave of judicial activism that has swept the globe in the last few decades has not bypassed the most fundamental issues a democratic polity ought to address—whether it is coming to terms with its own, often not so admirable, past or grappling with its embedded collective identity quandaries. With the possible exception of the judicial oversight of the electoral process itself, none of these recently judicialized questions are uniquely or intrinsically legal; although some may have certain important constitutional aspects, they are neither purely, or even primarily, legal dilemmas. As such, they ought to be resolved, at least on the level of principle, through public deliberation in the political sphere. Nonetheless, national high courts throughout the world have gradually become major decision-making bodies for dealing with precisely such dilemmas. Fundamental restorative justice, regime legitimacy, and collective identity questions have been framed in terms of constitutional claims, and, as such, have rapidly found their way to the footsteps of the courts.

III. WHY IS THIS HAPPENING?

Perhaps nowhere is the notion of constitutional law as politics by other means held truer than in the area of judicialized mega-politics. The examples discussed above highlight the fact that neither a constitutional framework that is conducive to judicial activism nor "power-hungry" judges or non-deferential constitutional courts are sufficient conditions for the judicialization of mega-politics. Assertion of judicial supremacy of the type described in this paper cannot take place, let alone be sustained, without the tacit or explicit support of influential political stakeholders. It is unrealistic, and indeed utterly naïve, to assume that core political questions such as the struggle over the nature of Canada as a confederation of two founding peoples, Israel's wrestling with the question of "who is a Jew?" and its status as a Jewish and democratic state, the struggle over the status of Islamic law in predominantly Muslim countries, or the transition to democracy in South Africa, could have been transferred to courts without at least the tacit support of pertinent political stakeholders in these countries. Like any other political institutions, constitutional courts do not operate in an institutional or ideological vacuum. Their explicitly political jurisprudence cannot be understood separately from the concrete social,

political, and economic struggles that shape a given political system. Indeed, political deference to the judiciary, and the consequent judicialization of mega-politics, are integral parts and important manifestations of those struggles, and cannot be understood in isolation from them. This brings us to a critical yet often neglected aspect of the story—the political determinants of judicialization. An authentic, "bottom up" judicialization is more likely to occur when judicial institutions are perceived by social movements, interest groups, and political activists as more reputable, impartial, and effective decision-making bodies than other bureaucracy-heavy government institutions or biased majoritarian decision-making arenas. An all-encompassing judicialization of politics is, *ceteris paribus*, less likely to occur in a polity featuring a unified, assertive political system that is capable of restraining the judiciary. In such polities, the political sphere may signal credible threats to an overactive judiciary that exert a chilling effect on courts. Conversely, the more dysfunctional or deadlocked the political system and its decision-making institutions are in a given rule-of-law polity, the greater the likelihood of expansive judicial power in that polity.[106] Greater fragmentation of power among political branches reduces their ability to rein in courts, and correspondingly increases the likelihood of courts asserting themselves.[107]

From the politicians' point of view, delegating contentious political questions to the courts may be an effective means of shifting responsibility, and thereby reducing the risks to themselves and to the institutional apparatus within which they operate. The calculus of the "blame deflection" strategy is quite intuitive. If delegation of powers can increase credit and/or reduce blame attributed to the politician as a result of the policy decision of the delegated body, then such delegation can benefit the politician.[108] At the very least, the transfer of contested political "hot potatoes" to the courts offers a convenient retreat for politicians who have been unwilling or unable to settle contentious public disputes in the political sphere. It may also offer refuge for politicians seeking to avoid difficult or "no win" decisions and/or avoid the collapse of deadlocked or fragile governing coalitions.[109] Conversely, political oppositions may seek to judicialize politics (for example, through petitions and injunctions against government policies) in order to harass and obstruct governments.[110] At times, opposition politicians may resort to litigation in an attempt to enhance their media exposure, regardless of the actual outcome of

106. Guarnieri & Pederzoli, *supra* note 20, at 160-82.

107. Ferejohn, *supra* note 2.

108. Stefan Voigt & Eli M. Salzberger, *Choosing Not to Choose: When Politicians Choose to Delegate Powers*, 55 Kyklos 289, 294-95 (2002).

109. *See generally* Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 Stud. in Am. Pol. Dev. 35 (1993).

110. *See generally* The Global Expansion of Judicial Power, *supra* note 2.

litigation.[111] A political quest for legitimacy often stands behind the transfer of certain regime-change questions to courts. (Consider the aforementioned Pakistani Supreme Court legitimization of the 1999 military coup d'état in that country.) Empirical studies confirm that national high courts in most constitutional democracies enjoy greater public legitimacy and support than virtually all other political institutions.[112] This holds true even when courts engage in explicit manifestations of political jurisprudence.[113]

The judicialization of mega-politics may also be driven by "hegemonic preservation" attempts taken by influential sociopolitical groups fearful of losing their grip on political power. Such groups and their political representatives are more likely to delegate to the judiciary formative nation-building and collective-identity questions when their worldviews and policy preferences are increasingly challenged in majoritarian decision-making arenas.[114] This trend is perhaps best illustrated in countries where growing popular support for principles of theocratic governance poses a major threat to the cultural propensities and policy preferences of moderate and relatively cosmopolitan elites in these countries.[115] An increasingly common strategy undertaken by political power holders representing these voices has been the transfer of fundamental collective-identity or "religion and state" quandaries from the political sphere to the constitutional courts.[116]

> Drawing upon their disproportionate access to and influence over, the legal arena, social forces in polities facing deep division along secular-religious lines aim to ensure that their secular Western views and policy preferences are less effectively contested. The results have been an unprecedented judicialization of foundational collective identity, particularly . . . religion and state questions, and the consequent emergence of constitutional courts as important guardians of secular interests in these countries.[117]

Related to this point is the proposition that the judicialization of formative collective identity questions is more likely to occur in cases of "constitutional disharmony" caused by a polity's commitment to apparently conflicting values such as Israel's self-definition as a Jewish and democratic

111. *See generally* Yoav Dotan & Menachem Hofnung, *Legal Defeats-Political Wins: Why Do Elected Representatives Go to Court?*, 38 Comp. Pol. Stud. 75 (2005).

112. *See generally* Joseph F. Fletcher & Paul Howe, *Public Opinion and Canada's Courts*, *in* Judicial Power and Canadian Democracy 255-96 (Paul Howe & Peter Russell eds., 2001); James L. Gibson et al., *On the Legitimacy of High Courts*, 92 Am. Pol. Sci. Rev. 343 (1998).

113. Gregory Caldeira et al., *The Supreme Court and the U.S. Presidential Election of 2000*, 33 British J. Pol. Sci. 535 (2003).

114. Hirschl, Towards Juristocracy, *supra* note 2.

115. Ran Hirschl, *Three Middle Eastern Tales*, *supra* note 65, at 1819.

116. *Id.*

117. *Id.*

state.[118] It is also more likely to occur when the values protected in a given country's constitution contrast with values prevalent among that country's populace. Consider Turkey's strict separation of religion and state despite the fact the vast majority of Turks define themselves as devoted Muslims.

The judicialization of politics may reflect the competitiveness of a polity's electoral market or governing politicians' time horizons. According to the "party alternation" model, for example, when a ruling party expects to win elections repeatedly, the likelihood of an independent and powerful judiciary is low. However, when a ruling party has a low expectation of remaining in power, it is more likely to support a powerful judiciary to ensure that the next ruling party cannot use the judiciary to achieve its policy goals.[119] Likewise, when politicians are obstructed from fully implementing their own policy agenda, they may favor the active exercise of constitutional review by a sympathetic judiciary to overcome those obstructions.[120] The judicialization of mega-politics may allow governments to impose a centralizing "one-rule-fits-all" policy upon enormous and diverse polities.[121] (Consider the standardizing effect of apex court jurisprudence in exceptionally diverse polities such as the United States or the European Union). Finally, the transfer of contested "big questions" to courts and other quasi-professional and semi-autonomous policy-making bodies, domestic or supranational, may be seen as part of a broader process whereby political and economic elites, while they profess support for a Schumpeterian (or minimalist) conception of democracy, attempt to insulate substantive policy making from the vicissitudes of democratic politics.[122]

The transfer of foundational collective identity questions to the courts seldom yields judgments that run counter to the interests of those who chose to delegate more power to courts in the first place. Likewise, the advancement of restorative justice through the courts has been, at best, incremental and lethargic. Occasionally, courts may respond to counter-establishment challenges by releasing rulings that threaten to alter the political power relations in which the courts are embedded. Legislatures in most new constitutionalism countries have been able to respond effectively to such unfavorable judgments or else simply to hinder their

118. *See, e.g.*, Gary J. Jacobsohn, *The Permeability of Constitutional Borders*, 82 Tex. L. Rev. 1763 (2004).

119. *See, e.g.*, Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 Am. Pol. Sci. Rev. 511 (2002).

120. Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 Am. Pol. Sci. Rev. 583 (2005).

121. F.L. Morton, *The Effect of the Charter of Rights on Canadian Federalism*, 25 Publius 173 (1995); *see also* Leslie Friedman Goldstein, Constituting Federal Sovereignty: The European Union in Comparative Context (2001).

122. Hirschl, Towards Juristocracy, *supra* note 2, at 211-23.

implementation. Perhaps the clearest illustration of the necessity of political support for the third face of judicialization is the political sphere's decisive reaction to instances of unwelcome judicial activism.

As the recent history of comparative constitutional politics tells us, recurrent manifestations of unsolicited judicial intervention in the political sphere in general—and unwelcome judgments concerning contentious political issues in particular—have brought about significant political backlashes, targeted at clipping the wings of overactive courts. These include legislative overrides of controversial rulings, political tinkering with judicial appointment and tenure procedures to ensure the appointment of "compliant" judges and/or to block the appointment of "undesirable" judges, "court-packing" attempts by political power holders, disciplinary sanctions, impeachment or removal of "objectionable" or "overactive" judges, the introduction of jurisdictional constraints, or clipping jurisdictional boundaries and judicial review powers. In some instances (e.g., Russia in 1993, Kazakhstan in 1995, Zimbabwe in 2001, and Ecuador in 2004), the actions taken as a part of this backlash have resulted in constitutional crises leading to the reconstruction or dissolution of high courts. To this we may add another political response to unwelcome rulings: more subtle, and possibly more lethal, sheer bureaucratic disregard for, or protracted or reluctant implementation of, unwanted rulings.[123]

Examples of the legislative override scenario in the new constitutionalism world are ample. American executives and legislatures have frequently revised, hampered, or circumvented constitutional court rulings.[124] In its famous ruling in *Mohammed Ahmad Kan v. Shah Bano Begum*, the Supreme Court of India held that the state-defined statutory right of a neglected wife to maintenance stood regardless of the personal law applicable to the parties.[125] This decision had potentially far-reaching implications for India's longstanding practice of Muslim self-jurisdiction in core religious matters. Traditionalist representatives of the Muslim community considered this to be proof of Hindu homogenizing trends that threatened to weaken Muslim identity. India's Parliament bowed to massive political pressure by conservative Muslims and overruled the Indian Supreme Court's decision in *Shah Bano* by passing the Muslim Women's (Protection of Rights of Divorce) Act. This new bill, its reassuring title notwithstanding, undid the court's ruling by removing the

123. *See* Lisa Conant, Justice Contained: Law and Politics in the European Union (2002); Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1991); Geoffrey Garrett et al., *The Politics of Legal Integration in the European Union*, 49 Int'l Org. 171 (1995).

124. *See* Terri Jennings Peretti, In Defense of a Political Court (1999); Gerald Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 Rev. Pol. 369 (1992).

125. Muhammed Ahmad Kan v. Shah Bano Begum, A.I.R. 1985 S.C. 945; *see also* Ayelet Shachar, Multicultural Jurisdictions: Cultural Differences and Women's Rights 81-83 (2001).

rights of Muslim women to appeal to state courts for post-divorce maintenance payments. It also exempted Muslim ex-husbands from other post-divorce obligations. The court, it seemed, understood the message. In a case dealing with the constitutionality of the Muslim Women's Act, the court's ruling was notably more moderate and ambiguous than its original ruling in *Shah Bano*.[126]

Or consider the harsh political reaction to, and corresponding legislative override of, the Australian High Court's expansion of Aboriginal rights. In its historic ruling in *Mabo v. Queensland II*, the High Court abandoned the legal concept of *terra nullius* ("vacant land") that had served for centuries as the basis for the institutional denial of Aboriginal title, established native title as a basis for proprietary rights in land, and held that Aboriginal title was not extinguished by the change in sovereignty.[127] In *The Wik Peoples v. Queensland*, the High Court went on to hold that leases of pastoral land by the government to private third parties did not necessarily extinguish native title.[128] Such extinguishment depended on the specific terms of the pastoral lease and the legislation upon which it was granted. The potentially far-reaching redistribution implications of *Mabo II* and *Wik* brought about an immediate popular backlash, with the powerful agricultural and mining sectors, backed by the governments of Queensland, Western Australia, and the Northern Territory, demanding an across-the-board statutory extinguishment of native title. In early 1997, the conservative government under John Howard willingly bowed to the counter-court political backlash by introducing amendments to the Native Title Act that, for all intents and purposes, overrode *Wik*.

Consider also a sip of Singapore Sling. Responding promptly to an unfavorable ruling by the Singapore Supreme Court concerning due process rights of political dissidents detained for "communist conspiracy to overthrow the government," the government of Singapore (controlled for the past four decades by the People's Action Party) amended the constitution to revoke the court's authority to exercise any meaningful judicial review over governmental powers of preventive detention.[129] In a widely publicized ruling in 1993, the Judicial Committee of the Privy Council (JCPC) in London overturned a decision of the High Court of Singapore to expel Mr. J.B. Jeyaretnam—a leading opposition politician—from the Singapore bar association. Prior to its judgment in the *Jeyartenam* case, the JCPC's status at the apex of Singapore's judicial system appeared inviolable. But as soon as the JCPC issued a ruling that ran against the political interests of Singapore's ruling elite, it was denounced by government officials as "interventionist," "going outside its prescribed

126. *See* Danial Latifi v. Union of India, A.I.R. 2001 S.C. 3958.
127. Mabo v. Queensland II (1992) 175 C.L.R. 1.
128. The Wik Peoples v. Queensland (1996) 187 C.L.R. 1.
129. Chng Suan Tze v. Minister of Home Affairs [1988] 1 S.L.R. 132 (Sing.).

role," "out of touch" with local conditions, and "playing politics." Merely weeks after the JCPC had issued its ruling, the Singapore government went on to pass a constitutional amendment that abolished altogether appeals to the JCPC.[130]

Recognizing the crucial political significance of the judiciary, politicians in other new constitutionalism countries have opted for tightening their control over the judicial appointment process. In late 1997, for example, a serious rift developed between Pakistani Prime Minister Nawaz Sharif and the Chief Justice of the Supreme Court, Sajjad Ali Shah, over the appointment of new judges to the court. The constitutional crisis came to a dramatic end when the chief justice was suspended from office by rebel members of the Supreme Court. A crisis of a similar nature occurred in January 2000, when General Perez Musharraf insisted that all members of the Cupreme Court pledge allegiance to the military administration. The judges who refused to take the oath were expelled from the court. Reacting to political turmoil following the controversial expropriation of white farmers' land in 2000, Zimbabwe's President Robert Mugabe and his ruling ZANU (PF) party ousted the hostile C.J. Gubbay in March 2001 and went on to appoint the supportive Chidyausiku as new chief justice of Zimbabwe's Supreme Court.[131] Mugabe also stacked the court with three other ZANU (PF) supporters to ensure his party's control over the judicial branch.[132] And in Egypt, disciplinary hearings were recently held against Egypt's Supreme Constitutional Court Judges Hisham el-Bastawisi and Mahmoud Mekki for openly accusing the government of electoral fraud in the November 2005 elections.[133]

In 2004, Venezuela adopted a law permitting President Hugo Chávez's coalition "to both pack and purge the country's Supreme Court."[134] The law increased the number of justices from twenty to thirty-two. Those new justices can be selected by a simple majority vote of the National Assembly.[135] The law also provides new mechanisms for removing justices.[136] One allows for suspending justices pending an impeachment

130. *See* Gordon Silverstein, *Globalization and the Rule of Law: "A Machine that Runs of Itself?,"* 1 Int'l J. of Const. L. 427, 439-440 (2003); Francis T. Seow, The Politics of Judicial Institutions in Singapore, *available at*, http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN002727.pdf.

131. *See* Derek Matyszak, *Creating a Complaint Judiciary in Zimbabwe*, *in* Appointing Judges in an Age of Judicial Power Dilemmas of Law in the Welfare State 203, 340-44 (P. Russell ed., 2006).

132. *Id.* at 345.

133. *Broken Promises*, Economist, Apr. 22, 2006, at 48-49. Egypt has a history of political interference with the judicial sphere. The most blatant example is the 1969 "massacre of the judiciary," where more than 200 senior judicial personnel were dismissed on "over-independence" grounds by a presidential decree.

134. Human Rights Watch, Questions and Answers about Venezuela's Court-Packing Law (July 2004), http://hrw.org/backgrounder/americas/venezuela/2004/.

135. *Id.*

136. *Id.*

vote; the other allows for dismissal and nullification of their appointments.[137] In neighboring Ecuador, major political crises in late 2004 and early 2005 led to the dissolution of that country's supreme court on two occasions in only four months.[138] In Trinidad and Tobago, Prime Minister Patrick Manning (of the mainly Afro-Trinidadian People's National Movement) has recently suspended Chief Justice Satnarine Sharma (an Indo-Trinidadian) for allegedly trying to help oust Prime Minister Basdeo Panday (an Indo-Trinidadian and Manning's chief political foe).[139] In April 1990, Argentina's President Carlos Menem expanded that country's supreme court from five to nine members, and single-handedly appointed the four new justices.[140] This blunt court-packing exercise effectively created an automatic pro-government majority on the bench. Over the last few years, President Eduardo Duhalde, and later President Néstor Kirchner, have forced all members of this bloc to step down, thereby creating a distinctly more progressive court.[141]

The post-communist world also has its fair share of anti-court backlash. The appointments of several activist judges of the Hungarian Constitutional Court, including that of Justice László Sólyom (now Hungary's president)—advocate of judicial activism based on an invisible constitutional "spirit" rather than text—were not renewed upon the completion of their initial nine-year term. Instead, the court was filled with new, notably more formalist judges advocating judicial restraint.[142] Kazakhstan's first Constitutional Court was dissolved following the 1995 election crisis in that country and a new French-style Constitutional Council was introduced. The Albanian Constitutional Court was suspended in 1998, its chair was arrested, and a constitutional amendment limiting the justices' tenure in office to nine years was introduced.

Arguably, the most glaring example here is the widely documented 1993 constitutional crisis in Russia that included the dissolution of the first Constitutional Court by President Boris Yeltsin. As is well known, President Yeltsin reacted to an overactive involvement of the Constitutional Court in Russia's political sphere by signing a decree suspending the Constitutional Court until the adoption of a new constitution. This marked the demise of the first Constitutional Court and its controversial Chair,

137. *Id.*

138. The court was dismissed by President Lucio Gutierrez for the first time in December 2004. *See Ecuador Dismisses Supreme Court*, BBC News, Dec. 9, 2004, http://news.bbc.co.uk/1/hi/world/americas/4082521.stm. Having been restored in January 2005, the court was dismissed for a second time in April 2005. *See A Coup by Congress and the Street*, Economist, Apr. 23, 2005, at 37; *Ecuador's Congress Backs Court Move*, N.Y. Times, Apr. 19, 2005, at A13.

139. *See Justice and the Judge*, Economist, July 22, 2006, at 40.

140. *See Another Wig Falls*, Economist, Oct. 8, 2005, at 46.

141. *Id.*

142. Kim Lane Schepple, *The New Hungarian Constitutional Court*, 8 E. Eur. Const. Rev. 81 (1999).

Valerii Zorkin, and brought about the establishment of the second Constitutional Court. Drawing upon a controlled comparison of the dockets of the first and second Constitutional Courts, Lee Epstein, Olga Shvetsova, and Jack Knight show that, in a marked departure from the first court era where the docket was dominated by politically charged federalism and separation of powers cases, the second Russian Constitutional Court resorted to the "safe area" of individual rights jurisprudence and tended to avoid federalism issues or separation of powers disputes.[143] In other words, harsh political responses to unwelcome activism or interventions on the part of the courts, or even credible threats of such responses, can have a chilling effect on judicial decision-making patterns. Variations on the same logic explain prudent judicial behavior in countries as different as Argentina,[144] Germany,[145] and Japan.[146]

CONCLUSION

I better stop this cascade of examples now before further exhausting the readers' patience. A few things must be clear by now. First, while constitutional theorists in the Anglo-American world have been preoccupied with limiting executive power in the so-called "war on terror" era, the global expansion of judicial power has marched on. Over the last few years there has been a tremendous growth in the reliance on courts for dealing with some of the most fundamental political quandaries a polity can contemplate. The judicialization of politics has extended well beyond the now "standard" judicialization of policy making through procedural justice or rights jurisprudence, to encompass mega-politics—electoral processes and outcomes, restorative justice, regime legitimacy, executive prerogatives, collective identity, and nation building. The wholesale judicialization of mega-politics reflects the demise of the "political question" doctrine, and poses a serious challenge to the traditional separation of powers doctrine. This trend marks a transition to what I have termed elsewhere "juristocracy"[147]—a sweeping phenomenon that no serious constitutional theorist in the United States or abroad can afford ignoring.[148]

143. Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 Law & Soc'y Rev. 117 (2001).

144. Gretchen Helmke, Courts Under Constraints: Judges, Generals, and Presidents in Argentina (2005).

145. Georg Vanberg, The Politics of Constitutional Review in Germany (2005).

146. *See generally* J. Mark Ramseyer & Eric B. Rasmusen, *Why Are Japanese Judges So Conservative in Politically Charged Cases?* 95 Am. Pol. Sci. Rev. 331 (2001).

147. Hirschl, Towards Juristocracy, *supra* note 2.

148. On the inexplicable divide between grand constitutional theory and the study of real-life constitutional law and politics, see generally Barry Friedman, *The Politics of Judicial Review*, 84 Tex. L. Rev. 257 (2005); Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 Law & Soc. Inquiry 309 (2002).

Second, the unprecedented involvement of courts in substantive political decision making is difficult to reconcile with some of the fundamental principles of canonical constitutional theory. An important distinction here is between mainly process-oriented issues on the one hand, and watershed political quandaries that the entire nation faces on the other. While there is little if any problem with courts securing procedural fairness of electoral processes, the judicialization of fundamental restorative justice dilemmas, regime legitimacy, and especially foundational collective-identity and nation-building processes is more troublesome. These questions of mega-politics—often dealing with the very definition of the nation as such—involve very high political stakes with little or no pertinent constitutional guidelines to address them. It is therefore hard to understand how, in responding to such questions, judges would be able to base their decisions on principles or considerations that are qualitatively different from principles or considerations that belong to the province of the legislative process or national referenda, and that might be better determined there.

The practice is equally problematic from a representative democracy point of view. The ever-accelerating reliance on courts for articulating and deciding matters of utmost political salience represents a large-scale abrogation of political responsibility, if not an abdication of power, by elected legislatures whose task is to make accountable political decisions. It may undermine the very essence of democratic politics as an enterprise involving a relatively open, at times controversial, but arguably informed and accountable deliberation by elected representatives. After all, the primary function that legislatures should fulfill is to confront and resolve problems, not to pass them on to others. By transferring political decision-making authority to the judiciary, these politicians manage to avoid making the difficult or potentially unpopular decisions concomitant with fulfilling the very public task they were elected to do—to make hard, principled, and accountable political and policy decisions, even if these decisions are not always popular with voters. By playing the "blame deflection" game, legislatures grant priority to their short-term interests (e.g., to garner electoral support by avoiding tough and often unpopular decisions) at the expense of political accountability and responsibility.

Finally, the existence of an active, non-deferential constitutional court is a necessary, but not sufficient, condition, for persistent judicial activism and the judicialization of mega-politics. Any way one looks at it, questions such as the secular nature of Turkey's political system, the war in Chechnya, Israel's fundamental definition as a "Jewish and democratic state," or the political future of Quebec and the Canadian federation, are first and foremost political questions, not judicial ones. A political sphere conducive to the judicialization of such purely political questions is therefore at least as significant to its emergence and sustainability as the contribution of courts and judges. This insight highlights a "court-centric" fallacy common among critics of judicial activism who often blame "power

hungry" judges and "imperialist" courts for "expropriating" the constitution, for being too assertive and excessively entangled with moral and political decision making, and subsequently disregarding fundamental separation of powers and democratic governance principles. As the examples discussed here illustrate, the portrayal of constitutional courts and judges as the major culprits in the all-encompassing judicialization of politics worldwide is too simple a tale; the judicialization of mega-politics, and the transition to juristocracy more generally, is first and foremost a political, not a juridical, phenomenon. Through that prism it ought to be studied.